

1 KAREN P. HEWITT
United States Attorney
2 THOMAS B. REEVE, JR.
Assistant U. S. Attorney
3 California State Bar No. 069310
Room 6293, at 880 Front Street
4 San Diego, California 92101-8893
Telephone: (619) 557-7159
5 *Tom.Reeve@usdoj.gov*
Attorneys for the Federal Defendants
6

7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
9

10 KATHLEEN VESTEVICH,

11 Plaintiff,

12 v.

13 THE UNITED STATES OF AMERICA;
CENTERS FOR MEDICARE AND
14 MEDICAID SERVICES; CNI
ADMINISTRATION SERVICES,
15 LLC; MICHAEL LEAVITT, Secretary of
the Department of Health and Human
Services, in his official capacity,
16

17 Defendants.
18

Case No. 08 cv 0027- L (JMA)

FEDERAL DEFENDANTS'

ANSWER TO FIRST AMENDED COMPLAINT

19 **ANSWER**

20 COME NOW the named Federal Defendants (Secretary of the United States Department
21 of Health and Human Services, Michael O. Leavitt, in his official capacity; the United States
22 of America; and Centers for Medicare and Medicaid Services), by and through their attorneys,
23 Karen P. Hewitt, United States Attorney, and Thomas B. Reeve, Jr., Assistant U. S. Attorney,
24 and in answer to Plaintiff's First Amended Complaint ("Complaint") states as follows.

25 Defendant, CNI Administration Services, LLC, ("CNI") is the Medicare Secondary Payer
26 Recovery Contractor and it is a "special contractor" with the responsibility of collecting
27 Medicare Secondary Payer debts. However, to the extent that it played any role in the
28 Medicare dispute at issue in this action, it was, at all relevant times, acting as to the benefit

1 of the Secretary. CNI is an improper and unnecessary party to this litigation. CNI has not yet
2 been served and therefore an answer on CNI's behalf is not yet due. When / if CNI is served,
3 it is likely the undersigned will also represent CNI.

4 The United States of America is an improper and unnecessary party. The Centers for
5 Medicare and Medicaid Services ("CMMS") is also an improper and unnecessary party.

6 1. Answering Paragraph 1 of the Complaint, Federal Defendants allege they are
7 without knowledge or information sufficient to form a belief as to the truth of the allegations
8 therein contained, and based thereon, deny generally and specifically each, all and every
9 allegation contained therein.

10 2. Answering Paragraph 2 of the Complaint, Federal Defendants admit the
11 substantial truth of the allegations contained therein.

12 3. Answering Paragraph 3 of the Complaint, Federal Defendants admit that
13 Defendant *Centers for Medicare and Medicaid Services* is a federal government entity. Except
14 as specifically admitted, Federal Defendants deny, generally and specifically, each, all and
15 every remaining allegation in said paragraph.

16 4. Answering Paragraph 4 of the Complaint, Federal Defendants admit that the
17 *Chickasaw Nation Industries* (also referred to as "CNI") is the Medicare Secondary Payer
18 Recovery Contractor and it is a "special contractor" with the responsibility of collecting
19 Medicare Secondary Payer debts. To the extent that it played a role in the Medicare dispute
20 at issue in Plaintiff's action, it was, at all relevant times, acting as to the benefit of the
21 Secretary. Except as specifically admitted, Federal Defendants deny, generally and
22 specifically, each, all and every remaining allegation in said paragraph.

23 5. Answering Paragraph 5 of the Complaint, Federal Defendants admit that Michael
24 Leavitt is the Secretary of the Department of Health and Human Services, the agency
25 responsible for administering the Medicare program. Except as specifically admitted, Federal
26 Defendants deny generally and specifically, each, all and every remaining allegation in said
27 paragraph.

1 6. Answering Paragraph 6 of the Complaint, Federal Defendants deny, generally
2 and specifically, each, all and every allegation contained therein.

3 7. Answering Paragraph 7 of the Complaint, Federal Defendants allege they are
4 without knowledge or information sufficient to form a belief as to the truth of the allegations
5 therein contained, and based thereon, deny generally and specifically each, all and every
6 allegation contained therein.

7 8. Answering Paragraph 8 of the Complaint, Federal Defendants allege they are
8 without knowledge or information sufficient to form a belief as to the truth of the allegations
9 therein contained, and based thereon, deny generally and specifically each, all and every
10 allegation contained therein.

11 9. Answering Paragraph 9 of the Complaint, Federal Defendants allege they are
12 without knowledge or information sufficient to form a belief as to the truth of the allegations
13 therein contained, and based thereon, deny generally and specifically each, all and every
14 allegation contained therein.

15 10. Answering Paragraph 10 of the Complaint, Federal Defendants allege they are
16 without knowledge or information sufficient to form a belief as to the truth of the allegations
17 therein contained, and based thereon, deny generally and specifically each, all and every
18 allegation contained therein.

19 11. Answering Paragraph 11 of the Complaint, Federal Defendants allege they are
20 without knowledge or information sufficient to form a belief as to the truth of the allegations
21 therein contained, and based thereon, deny generally and specifically each, all and every
22 allegation contained therein.

23 12. Answering Paragraph 12 of the Complaint, Federal Defendants admit that there
24 is a federal claim or federal right of action for recovery of money paid that is related to this
25 case. Except as specifically admitted, Federal Defendants deny, generally and specifically,
26 each, all and every allegation contained therein.

27 13. Answering Paragraph 13 of the Complaint, Federal Defendants deny, generally
28 and specifically, each, all and every allegation contained therein.

AFFIRMATIVE AND OTHER DEFENSES

1
2 1. The Court lacks jurisdiction over the subject matter.

3 2. The Complaint fails to state a claim against this Defendant upon which relief can
4 be granted.

5 3. The Declaratory Judgment Act (28 U.S.C. §§ 2201-2202) does not include a
6 waiver of sovereign immunity and provides no jurisdiction to bring this action.

7 4. Plaintiff has failed to exhaust available administrative remedies and therefore this
8 Court lacks subject matter jurisdiction.

9 5. The Defendant, Centers for Medicare and Medicaid Services ("CMMC") is not a
10 suable entity. Sovereign immunity has not been waived so as to permit suit against CMMC.

11 6. Title 28, United States Code, at section 1919, states, "whenever an action or
12 suit is dismissed in any district court . . . for want of jurisdiction, such court may order the
13 payment of just costs."

14 7. The Medicare program is a federally subsidized system of health insurance
15 benefits for the aged, the disabled, and persons suffering from End-Stage Renal Disease.
16 See Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395 *et seq* ("Medicare Act"). The
17 Secretary has been given broad authority to issue such regulations as may be necessary to
18 carry out the administration of the health insurance program. 42 U.S.C. §§ 1395hh(a),
19 1395kk.

20 8. Congress has authorized the Secretary to contract with entities (usually large
21 insurance companies) to make the administration of the Medicare program more efficient.
22 See 42 U.S.C. §§ 1395h & 1395u(a). Such Medicare "special contractors," "fiscal
23 intermediaries" and "carriers" perform routine program functions for the Secretary, such as
24 Medicare claims management, processing and payments, and the collections of debts owed
25 to Medicare.

1 9. The Chickasaw Nation Industries ("CNI") is the Medicare Secondary Payer
2 Recovery Contractor and it is a "special contractor" with the responsibility of collecting
3 Medicare Secondary Payer debts. However, to the extent that it played a role in the Medicare
4 dispute at issue in Plaintiff's action, it was, at all relevant times, acting as to the benefit of the
5 Secretary. 42 C.F.R. § 421.5(b).

6 10. Because Medicare paid the accident-related medical expenses of the deceased
7 Medicare beneficiary, James C. Vestevich, the Secretary is entitled to reimbursement in the
8 amount \$83,109.42 from the proceeds of the insurance settlement received by the behalf of
9 the beneficiary, pursuant to the Medicare Secondary Payer statute. *See* 42 U.S.C. § 1395y(b).

10 11. The Medicare Act affords persons who dispute Medicare's claim for
11 reimbursement with a carefully crafted administrative process. 42 U.S.C. § 1395ff(b)(1)

12 12. A beneficiary's right to challenge the existence or amount of a Medicare
13 overpayment includes, among other things, the right to request reconsideration, the right to
14 request a hearing before an Administrative Law Judge ("ALJ"), and the right to request a
15 review of an unfavorable ALJ decision before the HHS Departmental Appeals Board. 42 C.F.R.
16 §§ 405.720, 405.724, 405.807, 405.821 and 405.855.

17 13. A person may seek administrative review of CMMS' decisions regarding whether
18 Medicare has made an overpayment. 42 C.F.R. §§ 405.704(b)(13); 405.803. Once the
19 beneficiary has obtained a "final decision" of the agency, made after a hearing, the person
20 may obtain judicial review of the decision by filing an action in federal district court. 42 U.S.C.
21 § 405(g).

22 14. Under the Medicare Act the above procedure provides the only avenue for
23 judicial review of a final decision of the agency regarding the kind of Medicare overpayment
24 determination at issue here in this case. 42 U.S.C. § 1395ii, incorporating 42 U.S.C. § 405(h);
25 42 U.S.C. § 405(g).

